

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

NORINO PROPERTIES LLC,)
)
 Petitioner,)
)
 v.) C. A. No. 3998-MG
)
 MAYOR AND TOWN COUNCIL OF THE)
 TOWN OF OCEAN VIEW, DELAWARE,)
)
 Respondents.)

MASTER'S FINAL REPORT

Date Submitted: August 13, 2010
Final Report Issued: August 30, 2010

Brian J. McLaughlin, Esquire, of Monzack, Mersky, McLaughlin & Browder, P.A., Wilmington, Delaware; Attorney for Petitioner.

Dennis L. Schrader, Esquire, of Wilson, Halbrook & Bayard, P.A., Georgetown, Delaware; Attorney for Respondents.

GLASSCOCK, Master

This matter involves a challenge to a determination by the respondent Mayor and Town Council of the Town of Ocean View (the “Town”) that a proposed use of real property is inconsistent with current zoning, and to the Town’s subsequent denial of a proposed conditional use ordinance. The petitioner/property owner is Norino Properties LLC (“Norino”). Because this matter involves only a review of the law and the record as it existed at the time of the consideration of the ordinance, the parties filed cross motions for summary judgment. Another Master in this Court issued a bench draft report in favor of the Town on August 31, 2009. Norino took exception to the Master’s draft report.

Subsequently, the matter was reassigned to me and the exceptions were briefed and argued. This is my final report on the cross motions for summary judgment. After argument on this matter, Norino made a supplemental filing, noting that our Supreme Court, in the period since the draft decision of the Master was released, had clarified the rules of construction to be applied to interpret zoning ordinances. *See Chase Alexa, LLC v. Kent County Levy Court*, Del. Supr., 991 A.2d 1148 (2010); *Dewey Beach Enterprises, Inc. v. Board of Adjustment of the Town of Dewey Beach*, Del. Supr., ___ A.2d. ___, No. 465, Berger, J. (July 30, 2010)(Slip. Op.).¹ In light of the instruction provided in *Chase Alexa* and *Dewey Beach*, I find that the Town erroneously determined that Norino’s proposed development of its property was not a permitted use under the applicable zoning provisions. Norino is entitled to a declaratory judgment consistent with that finding, and the matter must be remanded to the Town for consideration of the development plan as a permitted use of the property.

¹ The Town was given an opportunity to respond to Norino’s submission.

Facts

Norino owns four acres of land on Atlantic Avenue in Ocean View. Atlantic Avenue is the main artery of traffic through Ocean View. The four-acre parcel (the “Property”) is located in Ocean View’s GB General Business District (the “GB District”). In December, 2007, Norino filed an application with the Town with a preliminary site plan for the Property. The preliminary plan contemplated three structures: a 6,720 square foot retail building, a 5,200 square foot office building and a 2,880 square foot convenience store. The proposed convenience store included eight gasoline pumps. While a retail building, office building and convenience store are all permitted uses within the GB District, the Town considered the gas pumps to be a non-permitted use in that area. Therefore, the Town Council considered Norino’s application as a proposed conditional use ordinance.

The resulting “ordinance to grant conditional use of land in GB General Business District for the installation of eight gas pumps to be located on a site containing 4.07 acres more or less, on Atlantic Avenue (Route 26) in the Town of Ocean View” (the “proposed ordinance”) was introduced on May 7, 2008 at a Town meeting. Public hearings were held on May 7, 2008 and June 10, 2008. At the public hearings, Norino argued that the convenience store with gas pumps *was* a permitted use in the General Business District. In addition, Norino presented evidence that the proposed ordinance should be enacted permitting a convenience store with fuel pumps, as a conditional use. Numerous Ocean View residents also testified at the hearing, many opposing the proposed ordinance. At the conclusion of the second (June 10, 2008) public hearing, the Town tabled consideration of the proposed ordinance until its next meeting. At that

meeting, held July 8, 2008, the Town declined to approve the proposed ordinance by a three to one vote. This action followed.

The issues

The Master issued a draft report upholding the findings and actions of the Town. By rule, that report became final after the expiration of seven days, except with respect to exceptions taken by Norino. Delaware Chancery Rules, Rule 144. I need, therefore, only consider here those exceptions taken by Norino to the Master's draft report, arguing that: 1) the Town was incorrect in its determination that a convenience store with fuel pumps was not a permitted use in the General Business District under the terms of the Ocean View Zoning Code; and 2) that the rejection of the proposed ordinance by the Town was based on insufficient evidence, and was thus arbitrary. Because of my determination that Norino's proposed development is a permitted use under the applicable ordinances, I need only address the first issue.

Discussion

The Town is bound to make land use decisions consistent with the Ocean View Zoning Code (the "Code"). Norino's property is within the GB District as delineated at § 222-16 of the Code. Norino proposes a development of its property which includes a retail store, an office building and a convenience store. The parties are in agreement that the office building and retail store are permitted uses within the GB District. The dispute is whether the GB district permits a convenience store with fuel pumps.

The Code provides that “permitted uses are listed for the various [zoning] districts. Unless the contrary is clear from the context of the lists of other regulations of this chapter, uses not specifically listed are prohibited.” Code, § 222-4 F. Section 222-16 provides a list of permitted uses for section GB. Among the permitted uses are “retail businesses of a convenience nature, including: ...[at subpart (c), a] grocery or convenience store (not to exceed 3,000 square feet).” Code, § 222-16.B. Accordingly, Norino argues that its proposed 2,880-square-foot convenience store is a permitted use. The Town agrees that the convenience store itself is permitted, but notes that section 222-16 is silent with respect to convenience stores *with fuel pumps*. Since uses not specifically listed are not permitted under the Code, the Town argues, a convenience store with pumps is not a permitted use.²

Section 222-16 specifically permits “Retail business of a convenience nature...including [a] convenience store.” The Code is silent as to the definition of “convenience store.” The term “convenience store” is of relatively recent vintage,³ and is accordingly of somewhat elastic meaning. Neither party has cited an authoritative definition. Norino’s counsel has asserted that a “modern” convenience store typically incorporates fuel pumps, and I take judicial notice of the fact that many convenience stores sell automotive fuel (and that many do not). The Town points out that the Code does not specifically permit a convenience store with pumps, but this simply begs the question; neither does the code specifically permit convenience stores with newspaper

² Actually, §222-4.F provides that non-listed uses are “prohibited” unless the context of the regulations provides otherwise. Norino argues that the context of 222-16, which recites non-permitted as well as permitted uses, indicates that the section 222-4.F analysis should not apply. I also note that the Town is not arguing that a non-listed use is prohibited, but instead is a non-permitted use that may be ratified by a variance. At any rate, as I describe below, because section 222-16 is ambiguous as to whether a convenience store with pumps is a permitted use, I need not reach the issue of the applicability of section 222-4-F.

³ 1965, according to Merriam-Webster’s 10th New Collegiate Dictionary (1996).

boxes, vending machines, propane exchanges, or a host of other attributes more or less common to convenience stores. The question is, does the permitted use “convenience store” in section 222-16 include the use proposed by Norino, a 2,880-square-foot retail store with eight gas pumps? With respect to this question the language so far examined, failing to define “convenience store,” is ambiguous.

As state above, our Supreme Court has recently clarified the rules of construction for ambiguous zoning statutes. These include rules generally applicable in cases of statutory construction:

Each part or section of a statute should be read in light of every other part or section to produce an harmonious whole. Undefined words in the statute must be given their ordinary, common meaning. Additionally, words in a statute should not be construed as surplusage if there is a reasonable construction which will give them meaning, and courts must ascribe a purpose to the use of statutory language, if reasonably possible.

Dewey Beach (Slip Op.) at 2, *quoting* Oceanport Industries, Inc. v. Wilmington Stevedores, Inc., Del. Supr., 636 A.2d 892, 900 (1994). In addition, when examining zoning regulations, ambiguities not otherwise resolvable by the rules above are construed in favor of the landowner. Dewey Beach (Slip Op.) at 4, *citing* Chase Alexa, 991 A.2d at 1152.

In interpreting section 222-16, I am referred by Norino to subsection I of that section, which provides that “[o]ff-street parking for *permitted uses* in GB General Business Districts shall be as set out in the schedule, attached hereto and made a part hereof, as more fully set forth.” (Emphasis added). The schedule for off street parking for permitted uses includes parking for “gas stations.” While a gas station, like a convenience store, is not a defined term,⁴ if

⁴ The Code does define “filling station” at section 222-82.F.

a convenience store with fuel pumps is not a “convenience store,” it is, in common parlance, a “gas station.”

The Town argues that, since the ordinance does not list gas station as a permitted use, the language in subsection I providing the requisite number of off-street parking spaces for a gas station as a “permitted use” in the GB District is “meaningless,” that is, mere surplusage that should simply be ignored. That analysis violates the rule of construction that all language of the statute should be given meaning, if reasonably possible. *E.g. Dewey Beach (Slip Op.)* at 3.⁵ Section 222-16, which explicitly permits convenience stores, refers to “gas stations” as permitted uses in zone GB as well. I do note that subsection I describes, as permitted, uses which are clearly described as non-permitted elsewhere in section 222-16. “Automotive repair,” for instance, is identified as not permitted in section 222-16.B(2)(I), and yet is designated as a permitted use in subsection I. I rely on subsection I only to demonstrate the ambiguity of section 222-16, and that construing a permitted “convenience store” as including a store with gas pumps is not necessarily inconsistent with the balance of section 222-16.

While opining that “[r]eference to other regulations within the Zoning Code provides little, if any guidance in determining whether ‘convenience stores’ may include gas pumps,” the Town in response to Norino’s exceptions points to the description in the Code of SC Service Commercial Districts (“SC Districts”).⁶ Permitted uses in the SC District include “(1) all uses

⁵ The Town also argues that the schedule in subsection I may have been intended to refer to “gas stations” as non-conforming uses allowed by supplemental ordinance in GB Districts, and not as permitted uses. This argument would be more persuasive if subsection I did not specifically address “off-street parking for permitted uses.”

⁶ See the Town’s Answering Brief in Opposition to Petitioner’s Motion for Summary Judgment, at 11, and the Town’s Answering Memorandum in Support of the Master’s Draft Report, at 1. According to Norino, Ocean View has yet to establish an actual SC District.

permitted in the GB General Business District; [and] (2) Motor vehicle sales, service, repair and parking....” Code § 222-17.B. The Town argues that, since section 222-17.B indicates that motor vehicle “service” is not a use permitted in District GB, and since gasoline sales by a convenience store are a kind of motor vehicle service, convenience stores with gas pumps are not permitted in District GB. In common English usage, is use by customers of a convenience store’s fuel pumps “motor vehicle service?” At best, the Town’s argument with respect to SC districts raises another ambiguity in connection with Norino’s proposed land use.

Is a convenience store with fuel pumps a permitted use in a GB district, under the Code? A property owner attempting to answer this question would find that a convenience store is a permitted use, but that that term is undefined, and it is therefor unclear whether a store with fuel pumps is permitted. In reading the Code as a whole, he would find that a “gas station” is referred to as a permitted use in District GB, according to the subsection referring to off-street parking, but not in the subsection referring to permitted uses. He would find that “motor vehicle service” was permitted in District SC, rather than GB, but no guidance as to whether sale of gasoline was within the definition of motor vehicle service. In short, a property owner wishing to construct a convenience store with fuel pumps in a GB District, who familiarized himself with the Code, would find that convenience stores are a permitted use and could reasonably conclude that his convinence store, including pumps, was permitted. The Town can show, at best, that an alternative reading is also reasonable; that because section 222-16 is silent as to gas pumps, they are not permitted.⁷ Under our law, such ambiguities must be resolved in favor of the

⁷ In reading the record in this case, it became clear to me that, in finding the fuel pumps non-permitted uses, and in denying Norino a variance, the members of the Town Council were making a good faith attempt to be responsive to the concerns of citizens, including themselves, that no business be permitted which would worsen an already unpleasant amount of auto traffic in Ocean View. The Town’s own Code, however, does not allow the

property owner and the free use of his property. Dewey Beach (Slip Op.) at 5; Chase Alexa, 991 A.2d at 1152.

Conclusion

For the reasons above, Norino's motion for summary judgment is granted, and that of the Town denied. Norino is entitled to a declaratory judgment that its proposed convenience store with eight fuel pumps is a permitted use in District GB. Once this report becomes final, Norino should supply a form of order remanding this matter to the Town for further action consistent with this report.

/s/ Sam Glasscock, III
Master in Chancery

respondents to vindicate these concerns in the manner which they have attempted to employ.